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ABSTRACT

The Canadian concept of "natural justice" is equivalent to "due process" in the United States. This paper traces the evolution of natural justice from English common law to its function in present day Canadian law. The extension of natural justice to school board employees is discussed. The paper points out that although in the past, the rules of natural justice applied to judicial acts rather than administrative acts, in recent times this distinction has been downplayed. The rules of natural justice have been extended to administrative acts through the concept of "fairness." The paper traces the emergence of fairness in Canadian law and its application to school board employees. The elements of fair process discussed are (1) employees should know their employers' expectations; (2) an employee should know if he or she is not meeting expectations; (3) an employee should be provided with help and time to remedy deficiencies; (4) an employee should know the probable results of a failure to improve performance; (5) the employee should be a full participant in the process of evaluation; and (6) the basis of the process should be empirical data. It is pointed out that boards must use their legislative powers to enact a policy of fair process. (Author/JM)

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NATURAL JUSTICE: ITS DEFINITION AND APPLICATION TO THE TERMINATION OF SCHOOL SYSTEM EMPLOYEES

A PAPER

Prepared for the
Second Congress of the
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June, 1979

by

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J.C.A.
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Edmonton, 1979

THE CONCEPT OF NATURAL JUSTICE

> "Besides, the objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. 'Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also." (*R. V. Chancellor etc of Cambridge University* [Dr. Bentley's Case] 1973, 1 Str 557)

Natural justice is a fundamental legal concept that is rooted in the common law, in biblical reference, and was enshrined in *Magna Carta*. The concept has throughout the centuries been reaffirmed in our jurisprudence. In the twentieth century its application has been broadened, its basic premises strengthened, and its existence repeatedly reaffirmed.

Although the existence and extension of the rules of natural justice are accepted by the Canadian judiciary, its definition and application defies simple explanation. What natural justice means in simple terms is fairness in the procedure used. It includes the basic principles of fair procedure which safeguard individual rights. It is "how" something is done, that is, the manner in which it proceeds; it does not involve why an action occurs. The merits or the reasons have no role to play in the concept.

The concept has been adopted from the English common law. The United States calls the concept "due process". Basically, due process and natural justice deal with the same procedural safeguards. There is a difference in the extent of the principles with the United States being more

"liberal" in their extensiveness. There is also a distinction in the application of the two concepts, again with the United States extending the application to areas not yet even contemplated by the English and Canadian legal systems. A major reason for the difference in the extent of the application is the existence of the guarantees in the American Constitution for which there is no equivalent in Canada.

The rules of natural justice include two prime concepts:

a) the opportunity to be heard, (*audi alteram partem*) (to hear both sides),

b) bias (*nemo judex in causa sua potest*) (no one can be a judge in his own cause).

Both concepts are undefinable in exact terms and usually are defined according to the circumstances of a particular situation.

Opportunity to be Heard

What constitutes "an opportunity to be heard" has been the subject of many legal cases. Although the judicial decisions are not exact nor do they provide definite rules for a "hearing", that is, an opportunity to be heard, they tend to consistently maintain that the hearing need not be formal and certainly not bound by the same rules as a court of law. Judge Kerans in an Alberta Board of Reference decision involving a school board expressed his view of the requirements:

> "As to the second argument, the rules of natural justice include the rule that the decision maker must hear both sides, or, more precisely, inform the persons whose rights are affected of the case against them and afford them a fair chance to answer it. Subject only to compliance with this principle, the actual mode of procedure is not a matter of natural justice, even including whether the hearing be an oral hearing or otherwise."

What constitutes a proper hearing is open to judicial interpretation. One point that is consistently applied is that non-legal bodies such as school boards, are not expected to apply strict rules of procedure and evidence that one is entitled to expect in a court of law. Please note the words of Justice Harman in *Bryne* vs *Kinematograph Renters Soc. Ltd.*, (1958) 1 W.L.R. 762, (1958) 2 All E. R. 590, where he says at p.599:

> "What, then are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more."

In *R.* vs *Ontario Racing Commission* 8 D.L.R. (3d) 625, the court held at p.628:

> "It is contended by the applicant that the Commission failed to observe the rules of natural justice in that, if the Ontario Racing Commission intended to place the applicant in jeopardy by suspension by reason of his conduct, the Commission was obliged to do two things in order to satisfy the requirements of natural justice, namely:
>
> 1. It should have given notice of the hearing in writing wherein it set out the conduct which was the subject matter of the complaint to which it was going to set its mind, so that the applicant would clearly know it was not merely an investigatory type of hearing but rather an accusatory type and that it should further have set out sufficient facts so that it would be obvious to a reasonable man that his conduct was in jeopardy;
>
> 2. It should have given clear and unequivocal notice in writing to the applicant that the conduct of which he was being accused may warrant suspension by the Commission if the complaints were substantiated.
>
> I agree with this submission."

Further, on p.629 the court stated:

> "I find that the Commission if it were acting in accordance with the principles of natural justice should have sent out a written notice, setting out the date and subject matter of the hearing, the grounds of the complaint against Morrissey, the basic facts in issue and the potential seriousness of the possible result of such a hearing. I find that this type of notice is the minimum which would satisfy the requirements of natural justice, especially in the case where a man's occupation and livelihood is placed in jeopardy and he has no forewarning of the case he must prepare to meet the accusations against him."

In *Elliot* vs *Governors of University of Alberta and Allen* (1973) 4 W.W.R. 195, Justice Lieberman dealt with how formal this requirement is at p.201:

> "The discussions held in the applicant's absence were not such as would in my judgement result in a denial of natural justice because of his exclusion; they were exactly what one might expect a board clothed with the duties and responsibilities of the tenure committee to hold. It must be remembered that the tenure committee is not a court of law and one cannot apply to it the strict rules of procedure and evidence that one is entitled to expect in a court of law."

In a recent Alberta decision involving the termination of a Superintendent of Schools, (*John McCarthy* vs *The Board of Trustees of Calgary Catholic Separate School District No.*, *et al* pronounced on May 3, 1979, unreported, Justice Laycraft concluded that the undefined nature of the "hearing" is desirable. At p.15 of the Reasons for Decision, he states:

> "In my view it is undesirable to specify the precise nature of the 'hearing' at this stage of the proceedings. The trial judge will determine the mode of hearing on a review of the record applying the type of procedure most appropriate to the circumstances as he sees them. It is necessary to comment, however, on some

> submissions made on behalf of Mr. McCarthy during the argument. These were complaints that he had not been afforded an opportunity to 'face his accusers' or to examine them. What seemed to be envisaged as a fair hearing was a formal prosecution and a formal defence with the trustees as a tribunal deciding, as do Courts, on the credibility of competing witnesses. This is not the type of hearing which in many cases is appropriate to the administrative process. Indeed one does not know whether in this case there are accusers to be faced, let alone whether to require it would be appropriate. Rather the trustees may have merely a general dissatisfaction with performance, or a view that the public might be better served by another Superintendent of Schools. Whatever be the reason, the type of hearing must be adapted to it in such a fashion that when the process is concluded, there will be no doubt that the Board has acted fairly."

Certain parts of the "opportunity to be heard concept" have caused challenges to terminations by employers.

It has been held that denial of the right of cross-examination is not a sufficient ground to establish contravention of the rules of natural justice. In *Strathcona No. 20* vs *MacLab Enterprises Ltd.*, (1971) 3 W.W.R. 461, 20 D.L.R. 3(d) 200 (Alta. C.A.), Johnson J.A. says at p.464:

> "One of the functions of cross-examination is 'to correct or controvert any relevant statement'. Its purpose can be much wider. One such use is to establish or assist in establishing, by cross-examining, the party's own case.
>
> A person appearing before quasi-judicial bodies is entitled to be heard and to present his case, and when this is not permitted there is a denial of natural justice. In the process of presenting his own case he is entitled to weaken and destroy the case that is made against him. In trials in court this is often effectively done by cross-examination. A party is often able to advance his own case from the mouths of his opponent's witnesses. It does not follow that the

> refusal of or the placing of limitations upon the right of cross-examination will always require that the court quash an order made in proceedings in which these restrictions are enforced. If he is afforded an equally effective method of answering the case made against him, in other words is given 'a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice' (to quote the words used above) the requirements of natural justice will be met. The importance of cross-examination will vary with the nature of the case being heard. I have read the judgements of the Supreme Court of Canada in *Toronto Newspaper Guild* v. *Globe Printing Co.*, (1953) 2 S.C.R. 18, 106 C.C.C. 225, (1953) 3 D.L.R. 561, and find nothing at variance with the view that I have expressed.
>
> In the present case it is for the respondents to establish that they have been denied the right of cross-examination and, having established this, that they were thereby denied natural justice."

Requests for adjournments frequently occur. When adjournments are denied, the question of a breach of natural justice occurs. According to the rules of natural justice, adjournments are to be granted if it would be "reasonable in the circumstances" to do so. In *Wigby* vs *Pearson, Spray and Board of Inquiry* (1977) 2. W.W.R. 654, the Yukon Supreme Court quashed a decision of the medical Board of Inquiry for failing to grant an adjournment of its quasi-judicial hearing. At p.659, the Court reviewed this point:

> "The question of whether or not the refusal of reasonable request for adjournment is reasonable must depend upon the circumstances of each case.
>
> In *Regina* v. *Labour Relations* (Ont.); *Ex parte Nick Masney Hotels Ltd.*, (1970) 3 O.R. 461, 13 D.L.R. (3d) 289, a decision of the Ontario Court of Appeal, Laskin J.A. said this, at p.294:
>
> 'We are not to be taken as saying that in no circumstances will a refusal to grant an adjournment be a proper ground for *Certiorari* as amounting to a denial of natural justice. The judgement delivered in *Regina* v. *Botting*, 48 C.R. 73,

> (1966) 3 C.C.C. 373, 56 D.L.R. (2nd) 25(C.A.), cannot be construed as going that far. The judgement of the Saskatchewan Court of Appeal in *Jim Patrick Ltd.* v. *United Stone & Allied Products Workers of Amer., Local 189* (1959), 29 W.W.R. 592, 21 D.L.R. (2nd) 189, illustrates an instance where refusal of an adjournment by a Labour Relations Board was held to amount to a denial of natural justice.'"

And further, the court proceeded to refer to a decision of Lord Widgery C.J.:

> "To start with, nothing is clearer today than that a breach of the rules of natural justice is said to occur if a party to proceedings, and more especially the defendant in a criminal case, is not given a reasonable chance to present his case. It is so elementary and so basic it hardly needs to be said. But of the versions of breach of the rules of natural justice with which in this court we are dealing constantly, perhaps the most common today is the allegation that the defence were prejudiced because they were not given a fair and reasonable opportunity to present their case to the court, and of course the opportunity to present a case to the court is not confined to being given an opportunity to stand up and say what you want to say; it necessarily extends to a reasonable opportunity to prepare your case before you are called upon to present it. A mere allocation of court time is of no value if the party in question is deprived of the opportunity of getting his tackle in order and being able to present his case in the fullest sense."

What constitutes "reasonable" notice depends on the circumstances of the case. In one decision, one day was considered to be reasonable notice. Yet in other decisions, two weeks has been held to be unreasonable.

The question of access to information before a hearing is held arises in the context of whether a full opportunity to be heard is being given. The governing factor is that the accused knows the case and is afforded the opportunity to respond to it.

The Alberta Board of Reference has repeatedly accepted the legal right of either party appearing before it to have prior access to all documents being presented in support of, or in defence of the termination of the teacher's contract of employment. This right to disclosure extends only to documents that are relevant to the issue at hand.

Bias

Bias, or the apprehension of a likelihood of it, is the second element of the rules of natural justice or *nemo judex in causa sua potest* as it is referred to.

Justice Lieberman, in *Elliott* vs *Governors of University of Alberta and Allen* (supra), reviewed the concept of bias in relation to natural justice. At page 204 he stated:

> "A mere possibility of bias is insufficient to support an application based upon a denial of natural justice. In *Regina* v. *Meyer* (1873), 1 Q.B.D. 173, Blackburn J. says at p.177:
>
> 'The effect of our judgement in that case was that though pecuniary interest is the subject matter of dispute, however small, disqualifies the justices, yet the mere possibility of bias did not ipso facto avoid the justices' decision; and we thought that, though there was a possibility of bias, in that case, yet it was not real. But we expressly excepted a real bias, saying, 'that we must not be understood to say, that where there is a real bias this Court would not interfere'.'
>
> See also Marshall on Natural Justice, pp. 32-3, and S.A. de Smith, Judicial Review of Administrative Action, 2nd ed., pp. 244-6.
>
> In *Regina* v. *Walker*, 63 W.W.R. 381, (1968) 3 C.C.C. 254 (Alta. C.A.) McDermid J.A. says at p.383:
>
> 'The trial judge, however, found that there was a possibility of bias against the respondent, and accordingly granted the order for prohibition. In *Regina* v. *Camborne J.J., Ex parte Pearce*, (1955) 1 Q.B. 41, (1954) 2 All E.R. 850, a court consisting of Lord Goddard, C.J. Cassels and Slade, J.J. endorsed the reminder of Lord Hewart, C.J. in *Rex*

> v. *Sussex J.J.; Ex parte McCarthy*, (1924) 1 K.B. 256 at 259, that it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'. However, they rejected the submission that a mere suspicion of bias by people, not necessarily reasonable people, was sufficient. The court said 'to disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceeding, a real likelihood of bias must be shown.' The test laid down by the court was whether a reasonable man in all the circumstances would consider there was a likelihood of bias. With the greatest of respect I agree with that test."

Lord Reid in *Ridge* vs *Baldwin* (1963) 2 All E.R. 66 at page 71 best provides a summation for a definition of the rules of natural justice.

> "...what a reasonable man would regard as fair procedure in the circumstances..."

THE EXTENSION OF NATURAL JUSTICE

What does all this mean for school boards when involved in terminations of its employees? Must the rules as outlined herein, albeit in inexact terms, apply to all terminations? What do various statutory references, such as "just cause", "at pleasure", "reasonably", to name a few, mean as far as natural justice is concerned? What about instances of no statutory requirements? The answers to these questions have by no means been resolved by the courts. There are recent judicial precedents that provide for the application of the rules of natural justice to termination procedures. In some instances such procedure was not followed nor, for the most part, was ever contemplated by school jurisdictions.

As school jurisdictions are creatures of statute, they have only those powers that are conferred either explicitly or implicitly by the enabling legislation and regulations thereunder. It becomes obvious that if the statute prescribes that the rules of natural justice apply to a particular termination, then the rules must be adhered to. Often the legislation refers to "an opportunity to be heard" or the obligation "to hold a hearing" before a decision is made. Those phrases are ways and means used by a provincial legislature to state that natural justice is to be applied.

There is a growing tendency for school statutes to provide for the fairplay procedures in terminations of certified staff. The right to a hearing for teachers and administrators is becoming a commonly expressed statutory requirement for school boards to follow. Where the statute clearly provides for the application of the rules, there is no dispute except with respect to what is involved in the concept as referred to herein.

Teachers are not alone in this protection. Where non-certified personnel such as janitors, secretaries, and bus drivers are unionized, it is likely that the collective agreement will contain a similar procedural requirement before an employee is terminated by the school board.

Although there is a trend to provide for the application of the rules, most statutes do not clearly provide for the application or non-application of the rules of natural justice. It is this question of "application" or right to the rules by an employee that is a frequent issue in court in recent years.

The Role of Function

Where the statute makes no express reference, the question of classification of function has been relevant in the past in determining if the "rules" apply. By function is meant whether an act could be categorized as judicial in nature, administrative in nature, or something else. In our discussion, the question is whether or not the termination of a person's employment was a judicial or an administrative act.

Although it was accepted in the beginning that for judicial acts the rules applied and for administrative acts the rules did not apply, courts gradually introduced a new function called "quasi-judicial" for which natural justice was also to apply. Judicial interpretations of the three functions vary, contradict each other, and are confusing. Often, it becomes a debate over semantics with no clear distinction. In recent times the classification of the function has been downplayed and not always relevant to the decision.

As this classification of function has given rise to conflict and controversy this past century, the judiciary has tended to avoid using past precedents and to bring forth new rules to assist in determining what procedure must be used. What "function" is the act of termination? Is it judicial, quasi-judicial, or administrative? Does the classification vary according to the type of employee involved? Because the answer to the third question is yes, the position held by the employee must be analyzed in each case.

As a general proposition, the master-servant relationship does not require the application of the rules of natural justice but they must be followed if the employee holds a "public office". Lord Reid in *Ridge* vs *Baldwin* (1964) AC 40 at p.65 stated:

> "The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them. The present case does not fall within this class because a Chief Constable is not the servant of the Watch Committee or indeed of anyone else."

Lord Reid divided the cases of employees who are terminated into three categories:

a) dismissal of a servant by a master

b) dismissal from an office held during pleasure

c) dismissal from an office "where there must be something against a man to warrant this dismissal".

Lord Reid referred to the concept of "public office". His conclusion in *Ridge* vs *Baldwin* was that the Chief Constable who had been terminated did hold a public office, therefore the rules of natural justice did apply. In that case, the statute did expressly provide that cause must exist. Whether an employee of a school jurisdiction holds a public office and is thus entitled to natural justice, is a question of fact and a question of the wording of the applicable school legislation.

In 1955, the Supreme Court of Canada reviewed the question of teacher rights in dismissal and concluded that a teacher was not a holder of public office so that the

rules of natural justice did not apply. In *LaCarte* vs *Board of Education of Toronto* (1955) 5 D.L.R. 369, a teacher's contract of employment with a school board was terminated without a hearing. The legislation was silent with respect to a hearing but the teacher argued that there should have been a hearing convened. Justice Rand concluded that a teacher did not hold a public office, and therefore was not guaranteed by common law a hearing prior to a dismissal. At p.372, Justice Rand stated:

> "Undoubtedly, in the relation of an employee, the teacher is exposed to the risk of arbitrary capricious or unjust action by school boards, and, considering the general unity of the administration, a professional career could, within the Province, by one such act, be virtually destroyed. But protection against that possibility must be left to the Legislature; the scheme of the law of Ontario does not, when fairly interpreted, create that independent office for which Mr. Duncan so strongly and earnestly argued. Whatever one's sympathies might be, these expressions of the legislative intention are too clear for doubt as to their meaning."

In Saskatchewan, where legislation was also silent, the courts reached the same conclusion that the rules of natural justice were not applicable to teachers employed by school boards. The act of terminating was construed as an administrative act. In the Saskatchewan Court of Appeal decision in *Dirks* vs *Board of Trustees of Estevan Collegiate Institute* (1970) 74 W.W.R. 368, Chief Justice Culliton decided at p.371:

> "Clearly, in the exercise of its right to appoint and to remove teachers, as given in the foregoing section, the board bases its decision, not on legal rights and liabilities, but on what it determines to be policy and expediency. Therefore, I am of the opinion that the exercise of that power is an administrative and not a judicial act by the board....

> There is nothing in the legislation requiring the board to act judicially in deciding to remove a teacher or terminate the teacher's contract of employment and consequently its decision to do so is not open to review on certiorari."

British Columbia has had no known reported decisions on this point. However, municipal councils in B.C. faced challenges. They function similar to school jurisdictions and may be so equated. In *Howarth* vs *City of Prince George* (1958) 24 W.W.R. 584 it was alleged that City Council was performing a judicial function when firing an employee so must afford him an opportunity to be heard and meet any evidence against him. The Court held, however, that any right to a hearing must be implied not from natural rights as the ordinary contractual relationship of master and servant does not require it, but from the particular circumstances of the case and especially from the governing statute. There, the governing statute used the words "for cause". The court held that the words "for cause" were not sufficient to confer on the City Council the necessity to hear all employees.

It should be noted that three criteria were given in the *Prince George* case for determining when an opportunity to be heard need be given:

1. The general highly inconvenient effect of requiring a municipality to conduct a judicial inquiry into the cause for dismissal before dismissing any employee including even a casual labourer.
2. The fact that no direct provision for a hearing is set out in the statute.
3. The fact that as in the *Nakkudi* case no natural or fundamental right is abridged. The right to employment is not a fundamental right.

The judicial interpretation of a teacher's status in Alberta has produced conflicting determinations. Justice Cavanagh of the Supreme Court of Alberta concluded that the master-servant relationship existed when a Board was considering the removal of a teacher. He concluded in *Regina ex Relatione Rudy Penner* vs *Board of Trustees of the Edmonton School District No. 7*, S.C.A. (1974, unreported [Cavanagh, J.]) that the rules of natural justice did not apply even though the Alberta legislation expressly required that a school board "act reasonably". Justice Lieberman, also of the Alberta Supreme Court, considered the same point in *Board of Trustees of the St. Albert Protestant Separate School District No. 6* vs *Elliott* (1972, unreported) and reached an opposite view. He concluded that the rules of natural justice do apply and further that school jurisdictions are acting, at least, in a quasi-judicial manner when terminating a teacher's contract of employment.

At p.3 of his unreported judgment, Justice Lieberman states:

> "When an individual's rights are affected by the decisions of a Board, that Board when considering those rights is acting in the least as a quasi-judicial body and as such must observe the rules of natural justice. *L'Alliance Des Professeurs Catholique De Montreal* vs *La Commission Des Relations Ouvrieres De La Province De Quebec et La Commission Des Ecoles Catholiques De Montreal* (1933) 4 D.L.R. 161."

The Quebec decision that Justice Lieberman relied on did not deal with dismissal. Its subject matter was a proceeding by a Labour Relations Board over an alleged "illegal" teacher strike. Although no hearing was expressly written into the procedure of the Labour Relations Board, the court held that the teachers were legally entitled to be heard before a decision was made.

Justice Lieberman also relied on "obiter" in a 1931 decision of the Supreme Court of Canada. Mr. Justice Duff in the case of *Richards* vs *Athabasca School District* (1931) S.C.R. says at p.165:

> "In the case of the termination of an agreement under clause 6 (if I am wrong in thinking that Section 196 does not apply to such a case), the question for the Minister would be whether the Board had adequate reasons for terminating the agreement. In either case it seems to me, the statute contemplates, before appeal to the Minister, a consideration of the matter by the Board after giving the teacher a full opportunity to be heard. The appellant's agreement provides for this in express terms, but the law would attach an analogous condition to the exercise of the powers of the Board in proceedings under Section 137(1)(0)."

The application of the rules of natural justice to the education area has its roots in old English law. The leading case is *Board of Education* vs *Rice* (1911) A.C. 179. The facts considered by the House of Lords was whether the Board of Education had properly determined a dispute between a body of school managers and the Local Education Authority. At issue, was whether the Authority had to pay teachers in church schools at the same rate as teachers in the Authority's own schools. The Lord Chancellor, Lord Loreburn, referred to the Board of Education's duties:

> "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the

> facts. I need not add that in doing either they must act in good faith and listen fairly to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think is best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view."

Lord Loreburn's epitome has become a frequently referred to statement on this subject and one given wide acceptance, particularly in recent years. Even before Lord Loreburn's famous epitome, a similar ruling in *Fisher* vs *Jackson* (1981) Ch 84 occurred when a schoolmaster was dismissed without a hearing.

In recent times, English and Australian Courts extended the application of the rules to most conflict situations. That a man should not be condemned unheard is considered more and more as a basic right for all conflict situations, including dismissal.

Fairness

A recent decision by the Supreme Court of Canada has followed the English trend. The Supreme Court of Canada, under the guidance and leadership of Chief Justice Laskin, has further extended this area into administrative acts by reference to a concept known as "fairness". Fairness is a concept similar to natural justice in that it guarantees certain procedural safeguards such as providing an opportunity to be heard.

The case in which this concept is enunciated is *Nicholson* vs *Haldimand-Norfolk Regional Board of Commissioners of Police et al* Pronounced on October 3, 1978

(a five to four decision). The majority of the Supreme Court of Canada decided that the act of dismissing a police constable was an administrative act. It took the concept of natural justice, which admittedly applied to judicial or quasi-judicial acts only, and effected a concept called "fairness" to be applied to administrative acts.

The concept of fairness resembles natural justice and is involved with the notion of fair play. It was considered necessary, even in the absence of statutory provisions and a finding that the act of dismissal was an administrative act, to observe "fairness". In other words, back-door approach was used to provide for the application of fair procedure to all acts of dismissals of public office holders, no matter if classified as administrative or quasi-judicial or judicial. It was the view of the majority of the Supreme Court of Canada at p.17 that the police constable should have been told by his employer, which was an administrative body:

> "why his services were no longer required and given an opportunity, whether orally or in writing as the Board might determine, to respond. The Board itself, I would think, would wish to be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination. Once it had the appellant's response, it would be for the Board to decide on what action to take, without its decision being reviewable elsewhere, always premising good faith. Such a course provides fairness to the appellant, and it is fair as well to the Board's right, as a public authority to decide, once it had the appellant's response, whether a person in his position should be allowed to continue in office to the point where his right to procedural protection was enlarged. Status in office deserves this minimal protection, however brief the period for which the office is held."

At page 13, Chief Justice Laskin expresses his opinion of the concept of fairness:

> "In short, I am of the opinion that although the appellant clearly cannot claim the procedural protections afforded to a constable with more than eighteen months' service, he cannot be denied any protection. He should be treated "fairly" not arbitrarily. I accept, therefore, for present purposes and as a common law principle what Megarry J. accepted in *Bates* vs *Lord Hailsham*, (1972) 1 W.W.R. 1373, at p.1378, 'that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness'."

The emergence of a notion of fairness involving something less than the procedural protection of traditional natural justice has been commented on in de Smith, *Judicial Review of Administrative Action*, *supra*, at p.208 as follows:

> "That the donee of a power must 'act fairly' is a long-settled principle governing the exercise of discretion, though its meaning is inevitably imprecise. Since 1967 the concept of a duty to act fairly has often been used by judges to denote an implied procedural obligation. In general it means a duty to observe the rudiments of natural justice for a limited purpose in the exercise of functions that are not analytically judicial but administrative. Given the flexibility of natural justice, it is not strictly necessary to use the term 'duty to act fairly' at all. But the term has a marginal value because of (i) the frequent re-emergence of the idea that a duty to observe natural justice is not to be imported into the discharge of 'administrative' functions and (ii) a tendency to assume that a duty to 'act judicially' in accordance with natural justice means a duty to act like a judge in a court of law. It may therefore be less confusing to say that an immigration officer or a company inspector or a magistrate condemning food as unfit for human consumption is obliged to act fairly rather than obliged to act judicially (or to observe natural justice, which means the same thing). However, close analysis of the relevant judgements is apt to generate its own confusion; for sometimes one judge will differentiate a duty to act fairly from a duty to act judicially and another will assimilate them both judges

> being in full agreement as to the scope of the procedural duty cast on the competent authority. (*Footnotes omitted*)
>
> What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all, would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question: see, generally, Mullan, *Fairness: The New Natural Justice* (1975), 25 Univ. of Tor. L.J. 281."

The May, 1979 decision of the Alberta Supreme Court, (McCarthy), as previously referred to, extended the application of the rules to Alberta Superintendents of Schools. Justice Laycraft classified the Superintendent as a holder of a public office. At p.10 he states:

> "In my opinion Mr. McCarthy, as Superintendent of Schools, clearly had status as the holder of a public office. By the terms of The School Act the Board was bound to appoint a Superintendent of Schools, and was required to include in its appointment a term that he was its chief executive officer.* The appointment was subject to Ministerial approval and certain minimum qualifications were specified. Moreover the very extensive powers entrusted to the Board under the Act could be delegated to him by express statutory provision. This status in my view takes this case out of the category of 'pure cases' of Master and Servant, where contracts may be terminated 'for any reason or for none'."

The Alberta School Act is silent regarding any requirement for a dismissal of a Superintendent. There are no statutory restrictions on a Board's power to terminate a Superintendent's services as existed in *Ridge* vs *Baldwin* wherein the statute allowed termination only in stated situations.

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* *Section 65 of The School Act provides for "executive officer" and not "chief executive officer" as referred to by Justice Laycraft.*

A 1975 article published in The Canadian Bar Review by David Phillip Jones of the Faculty of Law, McGill University in Montreal reviewed the "audi alteran partem rule". At p.808, Professor Jones made this conclusion even before the *Nicholson* decision which supports his view:

> "On the other hand, the principles of natural justice may well apply even where there is no quasi-judicial function. There is a strong line of fairly recent authority in both Canada and the United Kingdom which resuscitates Lord Loreburn's dictum in *Board of Education* v. *Rice* that anyone who decides anything has a duty to listen fairly to both sides. Indeed, the Supreme Court of Canada itself in the *Posluns* case adopted Lord Reid's analysis in *Ridge* v. *Baldwin* of this precise point. And the Federal Court of Appeal has clearly accepted this proposition in *Blais* v. *Basford* and *Laxarov* v. *Sec. of State*. It is too bad that all of the judges in *Saulnier* (perhaps still following the Privy Council's decision in *Nakkuda Ali*) linked their conclusions on the *audi alteram partem* issue inexorably to the existence of a quasi-judicial power -- and did not firmly seize the opportunity to implant the more general 'duty to be fair' into Canadian soil." (*Footnotes omitted*)

D. J. Mullan, an Associate Professor, Faculty of Law, Dalhousie University published an article in the University of Toronto Law Journal entitled *Fairness: The New Natural Justice*. His conclusion, after an analysis of Canadian decisions, was that "the situation in Canada with respect to the duty to act fairly as a procedural doctrine is very uncertain".

Chief Justice Laskin's pronouncement on October 3rd makes the concept much more certain. The effect of the *Nicholson* decision is unknown and may well be distinguished by other Canadian courts as only applying to the police force who are to be considered differently by law or as not being applicable under different legislation. Time will provide some of the answers for school jurisdictions.

In the interim, school boards will be involved in terminations and will be faced with decisions respecting procedures to follow in dismissal actions. The Alberta *McCarthy* decision expressly accepted the *Nicholson* concept so that its applicability to school system terminations has been confirmed by at least one court. The "best predication" supports more and more decisions which require "fairness" from school boards.

At this point in time, an analysis of the cases does not provide conclusive guidelines for boards to follow, but some principles do occur frequently:

1. Where statutes expressly deal with the rules of natural justice, the statute supercedes any common law and must be followed.
2. Where statutes are silent on the application of the rules, it may, no longer, be assumed that they do not apply to terminations.
3. The trend is to extend the application of procedural safeguards to dismissals, particularly dismissals of employees of public bodies such as school boards.
4. The specific wording of the relevant statute will determine, to a great extent, whether a hearing must be held prior to a dismissal.
5. For the rules of natural justice to apply, the act involved has been considered, either expressly or impliedly, to be judicial or quasi-judicial in nature. Administrative acts are not subject to the application of the rules of natural justice but may be subject to "fairness" which closely resembles natural justice.
6. The concept of fairness is obtaining growing acceptance and does apply to certain acts of

dismissal that are classified as "administrative" in nature where the statute is silent on termination requirements.

7. The act of terminating a school board employee may be classified either as judicial, quasi-judicial, or administrative depending on the type of employee and the statutory references to that employee.

School jurisdictions must be aware of the growing support for fair-play in dealing with its employees. They should remove themselves from possible claims of unfairness, of bias, and of procedural denials. Reasonableness dictates the need to obtain all information before a decision can be reached. School trustees must be careful to avoid allegations of rejection of principles enshrined in *Magna Carta* which extend back to the Garden of Eden.

From the foregoing, it is clear that school boards have been and will continue to be forced into the adoption of new processes and procedures. On the one hand, legislators are more inclined to include process requirements in legislation. The judiciary is more inclined to interpret specific situations in favor of more procedural protection of the individual. From another direction is the increasing protection for the individual which is provided in collective agreements.

Many employers, including public agencies, have responded to these pressures by resistance. Of course, this is one means of accommodating to the pressures. In simple terms, an employer avoids process or procedural changes which are perceived as limits to autonomy until change is found.

The purpose of this paper is not to criticize this

option. But it is suggested that greater autonomy may be achieved through the adoption of a more positive frame of reference and subsequent procedures. Simply, if good policy exists, there is no reason for third party intervention. The existence of good policy is not only protection of autonomy, however, good policy should result in a more efficient and effective performance of the system.

Efficiency and effectiveness are two primary criteria against which any proposed system changes should be measured. Here, the emphasis will be on effectiveness. (Drucker, 1973). Two other criteria are important in analyzing appropriate procedures: validity and reliability. Validity refers to the appropriateness of a measure given the end in view. (Webster, 1976). That is, does the procedure or process get at what is desired. For our purposes, two questions define the limits of validity: does the procedure or process provide the individual with fair treatment? does the procedure or process result in termination of those who should be terminated?

The focus of this discussion is on the termination of school board employees. However, the procedures which are here proposed are not designed solely, nor even primarily, for this purpose. To design procedures thusly would be destructive in the extreme. An example of this distructiveness is inherent in the now recognized administrative practice of "building a file" on someone.

More important, however, is that all aspects of personnel management should be characterized by fair process. It would be absurd to have a fair process of terminating employment and an unfair process of promoting individuals.

Therefore, it must be clear that although the

subject for discussion here is termination of employment, many of the same principles are equally applicable to other issues.

The second criterion, reliability, refers to the extent to which a procedure would yield the same results on repeated trials. (Webster, 1976). If a procedure is valid, it will not fail in achieving the desired effect. It is obvious then, that reliability itself has an element of fairness about it.

Each procedure or step in the process, should be examined on both the basis of the two criteria and the sum total of the procedures, i.e. the process, should meet the requirements of both criteria. It is possible that although the process might meet both criteria, a particular procedure within the process might not meet one or both criteria.

In addition to the concepts of the criteria used to judge the process, there are two additional concepts which require clarification. These are supervision and evaluation. For the purposes of this paper, supervision is meant to be the process by which employee behavior is monitored and directive action is taken. Supervision is thought of as a daily activity in which a supervisor observes, monitors, assesses, corrects, directs and counsels a supervisee.

Evaluation is thought of as a some time formal activity in which the whole or large part of an employee's behavior is assessed, usually, but not always, for some specific purpose. In educational evaluation terms, supervision depends on formative (on-going) evaluation; evaluation depends on summative (summary, end-of-the-line) evaluation.

It is obvious that the two concepts are closely related. In fact, it would be argued that they should be closely related, that supervision should flow to evaluation and evaluation should become the basis for further supervision.

In developing procedures to implement fairness in the supervision-evaluation process there are many alternatives which may be considered for each procedure. In the following outline of those procedures a number of means will be dealt with. For a variety of reasons a board may choose different means. In doing so, the criteria for a successful process referred to earlier should be considered.

ELEMENTS OF PROCESS

Every employee should know what is expected of him.

The task of specifying expectations of an employee begins with an analysis and specification of the job to be done. Variously referred to as job or role descriptions, this task requires specialized knowledge of job analysis.

There are many forms of job descriptions depending on the purpose for which they are created. In this discussion, the primary purpose is a clear and mutual understanding of the responsibilities of the employee. A second, but important purpose will be the pay and organizational classification of the job.

Job analysis and job descriptions particularly apply to non-teaching and administrative personnel. Although it is possible to apply the same techniques to teachers, it is not particularly appropriate. The job of teaching is and should

be defined in professional practice terms. With an adequate pre-service preparation program and in-service program, the teacher should clearly understand, for example, that he is responsible for identifying and using learning resources appropriate to his students. It might be useful for laymen to receive statements of those responsibilities, to discuss and clarify them and to periodically review them.

Generally, the attitude to job descriptions seems to be that once done, the task of specifying job expectations is complete. There are two important additions to the task of specifying job expectations, both of which are at least as important as job descriptions.

The first additional task is to ensure that all employees who are in any way responsible for implementation of a policy are specifically informed of new or revised policies. One of the acceptable defenses to failure to implement a policy change is to raise doubt that the change has been adequately communicated to affected staff members. Posting such changes on obscure bulletin boards or publishing them in never read manuals is not sufficient. It should be the clearly specified task of the administrator or supervisor to directly communicate policy changes to those affected by them.

The second additional task of specifying expectations is both more complicated and less well done. As previously stated, job descriptions are often accepted as definitive descriptions of what is entailed in the job. There are two reasons why this is not desirable. First, the job description is general and necessarily brief. It cannot and should not specify both the details of what is to be done nor how the job is to be done. Second, the job description does not provide details on job growth or improvement in performance. An example of a statement from a job description might be:

> Under direction, carries out research and prepares reports.

Such a statement does not specify timelines, format or other perhaps important, specifications.

Detailed specification of job expectations, therefore, must be established within the supervision process. From time-to-time - daily, weekly, monthly - the *when*, *what* and *where* of the job must be established.

This process involves interaction between supervisor and supervisee. The interaction process may be very formal as in some management systems or very informal as in small work crews. But formal or informal, it should be an expectation of every supervisor that such interactions do take place. Further, it is becoming increasingly important that some form of record keeping should reflect this interaction.

The record keeping of a results oriented management system can become a severe fault of the system. Extreme care should be taken that such a record keeping system does not take more resources than it is worth. However simple or complex the record keeping, it should provide a supervisor with a record of a supervisee's performance.

The supervision interaction should focus on three major questions: what needs to be done (improved)? what problems or difficulties are being encountered and what assistance is given? to what extent was what was agreed achieved? There are many complex management and supervision systems devoted to this interaction, but in whatever form they take, these are the essential questions.

How a supervisor achieves this interaction is primarily a function of training, but to some extent other

factors such as personality. A major weakness in the education supervision process may be a lack of training in supervisory skills. School boards that wish a close personal form of supervision may expect to supply or facilitate extensive in-service training.

How is such supervision provided to executive officers specifically a chief executive officer? Given the diverse nature of school boards, the leadership for providing such supervision for the chief executive officer should be the chief executive officer himself. He should provide the board with his plans, problems and accomplishments and the board should be open to him doing so. Failing this, however, the board must provide a structure for supervision of executive officers. It can be the board chairman, a small committee of the board or, more awkward by the full board. However it is done, the same requirement of record keeping should be met.

For teachers, in-school administrators are the front line supervisors. Size of school dictates the particular individual who provides supervision. Some supervision models provide for supervision of teachers by teachers. (Goldnammer, 1969). Although there is a variety of supervisory techniques and models, the essentials of supervision are included.

Every employee should know if he is not meeting expectations

During the preceding discussion of job expectations and the part played by supervision in establishing those expectations, one might assume that deficiencies in performance would be clearly identified. In an adequate supervision process this would be so. But experience

indicates (French, 1974) that supervisors tend to deemphasize what they believe are negative interactions. The effect of doing so is that the employee is not aware, at least, of the seriousness of deficiencies.

Any policy statement on supervision should emphasize the need for supervisors to communicate deficiencies in performance. Supervisors of supervisors should maintain a concern for this and reemphasize its need to supervisors.

Keeping in mind the distinction drawn between supervision and evaluation, it is in evaluation that deficiency identification is particularly important. We have encountered many examples in which supervisors have written laudatory evaluation reports with full knowledge that serious deficiencies existed. The same reports were later used as a defense against termination.

As indicated, it is not easy to tell someone he has performance deficiences. There is a great reluctance to express this in any form of human relations. Much of interpersonal relations training is an attempt to develop skills to deal with negative situations. However, doing so, is an essential ingredient in treating others fairly (and honestly!).

School boards may face special problems with some of their executive officers. It is very difficult to clearly explain what "loss of confidence" in an executive actually means, but that should not deter boards from trying.

Often a board becomes disenchanted with an appointed official for a variety of reasons, large and small. Many of the reasons are not shared by every member of the board, but nonetheless are important in forming individual judgements.

During the periodic meetings to review the executive's performance, the mechanism should provide an opportunity for *each* board member to express dissatisfactions. The concern should be placed in perspective by the whole board and its relative significance determined. However, no matter how insignificant the concern may be, a very small adjustment by the executive officer may remedy the concern.

The employee should be provided with help to remedy deficiencies

Obviously, some deficiencies are so gross that even if remedied, a satisfactory relationship is unlikely. But there are very few of these instances. The perspective from which one should operate, one that is typical in business, is that there was reason and costs in the hiring of the individual. That reason and those costs are justification for even extensive assistance to the employee.

Although the employer has reascn to provide such help, the employee must be prepared to actively seek remedies. That is, he has a responsibility to try.

The primary source of help within the organization is the employee's supervisor. This responsibility includes helping the employee to identify what needs to be done and identifying how that help can be provided. Often, the supervisor does not, himself, have the resources. But he should be able to seek out the resources and bring the employee into contact with them.

Finally, the supervisor has a prime responsibility in determining the time that should be given to necessary improvements. He must judge how critical the necessary improvements are to the job and what a reasonable time is in effecting improvement.

An employee should know the probable results of a failure to improve performance

> "I didn't know I was in trouble because nobody got mad at me."
>
> *(A quote attributed to an Alberta teacher)*

Although it is not necessarily a requirement of fairness that someone "get mad", the quotation does support the need for a very clear understanding of the consequences of a failure to improve. If lack of improvement will lead to termination, this should be clearly communicated. If, on the other hand, the improvement sought is less critical, then that should be clear. Relatively minor inadequacies should not be given the same status as major ones. The employee may then need someone to "get mad" before he understands the difference.

Communicating consequences should probably involve a higher level than the first line supervisor. If the deficiencies are such that termination is a possibility, the first line supervisor should already have consulted with his supervisors in identifying the need and means for improvement.

Because the second or third level supervisor is more likely to actually effect a termination (rather than the first level supervisor who may only recommend) the actual threat of termination should come from that level.

Precisely the same responsibility for communicating probable consequences rests upon school boards. It is perhaps even more important that a board, in communicating with its officers, be very clear about probable outcomes. If it does not, it is easy for a high cost individual to spend too much time on relatively inconsequential improvements.

The employee should be a full participant in the process

One of the strongest means to increase the validity of the process is through employee participation in the process. (French, 1974).

Ideally, every step in the process, including the decision to terminate service, would be by mutual consent. This ideal is not completely unrealistic, as many administrators and managers know. A supportive, intensive supervisory process can achieve those ends.

The ideal supervisory process is well beyond the resources of many school systems. Traditionally, school systems have many fewer supervisors per employee than most enterprises. Intensive supervision, then, is unlikely except for "problem" cases.

The ideal supervisory process requires supervisory skills which may not be common in educational supervision. The ideal process requires a personalization (Sergiovanni, 1975) of the supervisory process which, for many can only be acquired through training.

A second problem in achieving the ideal is when every effort to penetrate the perceptions of the employee fails to bring an acknowledgement from an employee that any problems exist or that any corrective actions are required. An employee may use a number of psychological defenses and no supervisor is expected to apply psychological therapy.

In this latter situation, the supervisor should be expected to do what a reasonable person would do. He should clearly communicate the deficiency and suggestions

for remediation. He should clearly communicate possible consequences. And he should continue to invite participation, feedback and response from the employee.

Probably the most effective perspective for a supervisor is a problem-solving one. If he approaches his supervisory interactions as primarily a mutual search for, and solution to, problems he is most likely to gain employee participation.

The basis of the process should be empirical data

There is a growing concern for the use of soft, opinion data in personnel evaluation. Such data involves, particularly, value judgments. Value judgments, when used loosely, are difficult to substantiate. Regardless of the legal problems involved, however, soft data does not ensure maximum validity and reliability.

As an example, contrast the following statements:

1. In the conduct of lessons Mrs. Jones is a poor questioner.
2. Mrs. Jones' questioning of students does not allow students' thinking to go beyond recall learning.

In the former, Mrs. Jones is condemned. In the latter, the focus is on the cause and effects of her questioning. Although it may be complex (in fact, it is not) the last statement can be substantiated by data related to an actual event. Other observers can check the event and, therefore, the accuracy of the statement. The ability to confirm a statement by reference to an event provides very high reliability. Further, however, if the supervisor-

supervisee can focus on objective information, it is likely that the process will be more founded in reality and, therefore more valid.

The focus on objective data encourages realistic management work plans. Without pushing it to behavioral objectives, it is obviously encouraging if a supervisor and supervisee can achieve real agreements. Rather than the electrician agreeing to "do a better job installing outlets", reliability would be greatly enhanced if the agreement were that all outlets would henceforth be square to floors and walls.

A side advantage, but a very important one, to a focus on empirical data is that it eases the interpersonal problems of the supervisor. A major reason for the reluctance of supervisors to deal with problems is the feeling that one is criticizing a *person*. If discussions are founded on empirical data, the personality of the employee is less involved.

In summary, the elements of fair process are:

1. An employee should know the expectations of him.
2. An employee should know if he is not meeting expectations.
3. An employee should be provided with help and time to remedy deficiencies.
4. An employee should know the probable results of a failure to improve performance.
5. The employee should be a full participant in the process.
6. The basis of the process should be empirical data.

IMPLEMENTING THE PROCESS

Good supervisors have already implemented the elements of a fair process. Just as good army sergeants and good foremen have always been fair regardless of the systems within which they have operated.

The point in this paper is that it is no longer sufficient for school boards to rely on the individual abilities of supervisors to ensure fair process are in place. Both for its supervisors *and itself*, boards must use their legislative powers to legislate policy. The policy should be directed toward the creation of a fair supervisory and evaluation process.

As previously indicated supervision and evaluation have many more (positive) purposes than the fair termination of employees. The end sought by a good supervision and evaluation policy is likely to be greater system effectiveness or greater system efficiency. In any case, a good policy requires extensive consideration.

Depending on the level of supervisory ability, a board may have to allocate resources for supervisor in-service development. A board should be prepared to recognize such a need.

Finally, a board must begin with itself. Boards must develop procedure to ensure fair treatment of its executives. There is increasingly less tolerance for arbitrary treatment of people.

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